

where one officer was British.⁴⁵

The FCC seems not to have appreciated the presumption in it, a telecommunications regulatory agency, making pronouncements about foreign affairs. Nor do the FCC decisions in this area recognize that, by creating such a criterion for deciding whether to grant a waiver under section 310(b)(4), the agency creates the potential for international embarrassment if it were ever to deny a waiver on the grounds that the alien's country was not friendly to the U.S. For example, despite having been America's ally in two world wars, France sometimes conspicuously abstains from supporting American foreign policy and has on occasion denied U.S. warplanes passage through French airspace when flying from Britain to the Mediterranean to launch air strikes. That is not very friendly, but surely it would not justify the FCC restricting French investment in American radio licensees on national security grounds. If the FCC took it seriously, the friendly-citizenship criterion would be a Pandora's box. One can therefore expect the FCC only to invoke the criterion when it would grant a waiver anyway, and then only when the case is not a close call.

*Will the Facility
Exercise Editorial Control?*

The FCC will determine whether the licensed facility involved is editorially passive, as is a common carrier, or has control over the content of transmissions. Thus, in *Data General Corporation*, the FCC permitted an alien officer in the licensee's parent because the licensee lacked editorial control.⁴⁶ In *Millicom Inc.*, the FCC ruled that common carrier microwave facilities are passive, and thus approved alien officers.⁴⁷

45. *Data Gen'l Corp.*, 2 F.C.C. Rcd. 6060, 6060 ¶¶ 4-8 (1987).

46. *Id.* at 6060 ¶ 7 (allowing alien officer of licensee's parent because of licensee's passivity).

47. 4 F.C.C. Rcd. 4846, 4847 ¶ 12 (1989); see also *LCI Comm., Inc.*,

*Does the Alien Offer
Valuable Expertise or Capital?*

The FCC will consider the financial or professional qualifications of the applicant. In *Houston International Teleport, Inc.*, the agency approved an alien officer who had valuable management, technical, and business expertise.⁴⁸ The FCC has also considered whether foreign participation would help ensure the continued vitality of a business, thus preserving U.S. jobs and shareholder value.⁴⁹

*Does the Alien
Control Operations?*

The FCC will examine whether the alien officers or directors also control or supervise operations of the licensee. In *Comsat General Corporation*, the FCC approved alien officers and directors in excess of one-fourth the board on the condition that they would not exercise direct control over the licensee.⁵⁰ The FCC will also consider the extent to which other officers and directors are U.S. citizens.⁵¹ The FCC now routinely permits

Mimeo No. 3491 at ¶ 6 (Mar. 31, 1986), *discussed in* Gavillet, Foehrkolb & Wu, *supra* note 19, at 14 (waiver granted when facilities were "passive because the licensee does not initiate or control the content of the transmission.").

48. 2 F.C.C. Rcd. 1666, 1666 ¶¶ 5-6 (1987).

49. *Millicom*, 4 F.C.C. Rcd. at 4848 ¶¶ 15-16.

50. 3 F.C.C. Rcd. at 4218 ¶ 26. *See also* Atlantic Tele-Network, Inc., 7 F.C.C. Rcd. 6634, 6635 ¶¶ 6-7 (1992); GCI Liquidating Trust, 7 F.C.C. Rcd. 7641, 7641 ¶5 (1992); Continental Ill. Venture Corp., 6 F.C.C. Rcd. 1944, 1944 ¶ 5 (1991); McCaw Cellular Comm., Inc., 5 F.C.C. Rcd. 6258, 6258 ¶¶ 6-7 (1990) (where alien officers will not be involved in day-to-day activities of the licensee, excess over section 310(b)(4) limit on officers is not contrary to public interest).

51. General Elec. Co., 5 F.C.C. Rcd. 1335, 1335 ¶ 6 (1990) (twelve of thirteen officers and thirty-two of thirty-three directors to be U.S. citizens); *Atlantic Tele-Network*, 7 F.C.C. Rcd. at 6634 ¶ 6.

holding companies to have alien officers where the officers will exercise no control or supervision over the operation of the licensed facilities. For example, in *International Telephone & Telegraph Corporation*, the FCC allowed two officers, one Canadian and one British, neither of whom would be involved in the activities of ITT's communications subsidiaries.⁵² And, in *American Satellite Corp.*, the FCC granted a waiver to the parent (Continental Telephone Company) of a common carrier radio station licensee to permit the parent to have a British vice president for finance who was also a director.⁵³ The FCC did not explain its reasoning, despite the fact that the applicant did *not* pledge that the officer would not be involved in supervising the licensee subsidiary.

COMPLIANCE WITH FOREIGN STOCK OWNERSHIP LIMITS

Section 310(b) also limits the stake that a foreign investor may hold in a radio licensee by purchasing stock, either in the licensee itself or in a corporation that in turn owns stock in the licensee. The import of these limits is that the foreign shareholders will always be in the minority. There is no assurance that the majority shareholders will protect the interests of the minority shareholders. Again, the foreign investor faces an impediment to monitoring the firm's management. If the interests of the majority shareholders do not coincide with the foreign investor's, he will have no other way to protect his

52. 67 F.C.C.2d 604, 605 ¶ 8 (1978). *See also* Advanced Mobile Phone Serv., Inc., 54 Rad. Reg. 2d (P & F) 354, 357 (Common Carrier Bureau 1983) (reading *ITT* decision as promulgating general rule authorizing alien officers of corporate parent when officers will exercise no control or supervision over the operation of licensed facilities); *accord*, *General Elec.*, 5 F.C.C. Rcd. at 1335 ¶ 6 (British manager "will be the only one of thirteen elected officers . . . not a United States citizen").

53. 80 F.C.C.2d 254, 271-72 ¶¶ 60-63 (1980).

investment by monitoring the performance of management.

Sections 310(b)(3) and 310(b)(4) apply to foreign holdings of "capital stock." Capital stock traditionally includes preferred stock, common stock, voting and nonvoting stock,⁵⁴ and convertible nonvoting stock.⁵⁵ Arguably, section 310(b) ought to distinguish among these different types of stock, for they differ in the extent to which they bundle ownership and control into a single financial instrument. Different types of stock will give investors different rights to the residual net cash flows in the radio licensee and different voting rights with which to control the licensee's management.

Perhaps reflecting the undeveloped state of academic research on corporate finance in 1934, section 310(b) fails to distinguish between stock that confers the right to control the corporation and stock that merely confers the right to receive the corporation's residual net cash flows. How then does the FCC determine compliance with section 310(b) in the most straightforward cases, where the FCC has already determined that the equity interest involved is "capital stock."

Section 310(b)(3)

In determining whether a licensee has complied with section 310(b)(3), the FCC will count the percentage of shares held by aliens in the licensee corporation. For purposes of section 310(b)(3), the FCC will also count the alien's shares in a corporation that owns less than 50 percent of the shares of a licensee. "Any ownership or voting interest held by an individual other than a United States citizen or by an entity organized under the laws of a foreign government is counted in the appli-

54. *Spanish Int'l Comm. Corp.*, 4 F.C.C. Rcd. 2153, 2154 ¶ 12 (1989) ("Voting and non-voting stock interests are indistinguishable for purposes of section 310(b).").

55. *Wilner & Scheiner*, 103 F.C.C.2d at 521 n.37; Gavillet, Foehrkolb & Wu, *supra* note 19, at 24.

cation of the statutory benchmarks.”⁵⁶

The Multiplier. This FCC policy raises the question of how the agency should measure the extent of an alien’s interest, when the alien holds, say, a 10 percent interest in a corporation with a 20 percent interest in a licensee. Clearly, it would not be correct to say that the alien holds either a 10 percent or a 20 percent interest in the licensee. Instead, the FCC concludes that the alien holds 10 percent of the 20 percent interest—giving it only a 2 percent interest in the licensee. The FCC employs this simple calculation, known as the “multiplier,” in seeking to measure an alien’s interest in a licensee, when the alien holds stock in an intervening corporation rather than in the licensee directly.

There is an additional complication. Suppose that the alien holds a 51 percent interest in a corporation with a 20 percent interest in a licensee? The FCC would then assume that the alien controlled the corporation, just as if the alien held a 100 percent interest in the corporation.⁵⁷ Consequently, the FCC would not generally use the multiplier when an alien’s ownership interest in the intervening corporation exceeded 50 percent; however, the FCC will still use the multiplier if the alien’s interest is in the form of nonvoting stock.⁵⁸

If the FCC determines that a licensee does not comply with the 20 percent cap on alien investment directly in a licensee, the FCC will require the alien to divest itself of its interest in the licensee.⁵⁹ Thus, the FCC forced one company to sell its television stations to unrelated buyers with no alien

56. *Wilner & Scheiner*, 103 F.C.C.2d at 521 ¶ 17.

57. *Id.* See also Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Dkt. No. 20251 *et al.*, 97 F.C.C.2d 997, 1018 ¶ 41 (1984) (*Attribution Order*), *recon. granted*, 58 Rad. Reg. 2d (P & F) 604 (1985), *recon. of later order granted in part*, 1 F.C.C. Rcd. 802 (1986).

58. Gavillet, Foehrkolb & Wu, *supra* note 19, at 12, 24.

59. *Wilner & Scheiner*, 103 F.C.C.2d at 518 ¶ 12.

affiliations, although the agency kindly forbore from enforcing its policy of requiring a unqualified licensee to sell at below market value.⁶⁰

When Section 310(b)(4) Also Applies. Suppose that an alien investor holds a 10 percent interest directly in a radio licensee, and also holds a 20 percent interest in a holding company with a controlling interest in a licensee. In determining whether the alien has violated section 310(b)(3), would the FCC add the two interests together?

The FCC has determined that it will not count—or “flow through”—interests in a holding company to determine whether a foreigner has violated section 310(b)(3). In *Data Transmission Co.*, a Swiss citizen named Walter Haefner owned debentures that could be converted into a 22 percent interest in a company that held an 85 percent interest in a microwave radio licensee.⁶¹ If the FCC were to apply the multiplier in this case, it would find a 19 percent foreign interest in the licensee—that is, 22 percent x 85.5 percent = 19 percent. In addition, Haefner held a 9.5 percent foreign interest in the licensee itself. The 22 percent interest did not by itself violate section 310(b)(4), and the 9.5 percent interest did not by itself violate section 310(b)(3). *Data Transmission* asked the FCC to rule that Haefner’s potential 19 percent interest in the licensee would not be added to the 9.5 percent that he held directly. If the interests were added, Haefner’s holdings in *Data Transmission* would exceed the 20 percent limit in section 310(b)(3).⁶²

The FCC ruled that Congress “did not intend a ‘flow through’ effect whereby ownership in a parent corporation would be included with the ownership interest of the subsidiary licensee.”⁶³ A foreigner may therefore hold up to 20 percent

60. *SICC*, 2 F.C.C. Rcd. at 3339–40 ¶¶ 21–22.

61. 52 F.C.C.2d 439 (1975) (*Datran II*).

62. *Id.* at 439–40.

63. *Id.* at 440 (citing S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934)).

ownership or voting interest directly in a licensee and up to a 25 percent interest in the company controlling the licensee.⁶⁴ In this manner, a foreign investor may enlarge his stake in a licensee without violating section 310(b). He will, of course, still not hold a controlling interest in either corporation.

Section 310(b)(4)

Section 310(b)(4) is used to measure alien ownership interests when a licensee is controlled by another corporation. This section allows foreign investors to own up to 25 percent of a parent or holding corporation, and permits up to one-fourth of its directors to be aliens.⁶⁵ Just as the FCC may waive the section 310(b)(4) restrictions on alien officers, the FCC may waive section 310(b)(4)'s limits on stock ownership.⁶⁶ The FCC has based its waiver decisions on the following "public interest" factors.

Broadcast. In *Banque de Paris de Pays Bas*,⁶⁷ a French bank sought to obtain a beneficial interest in 18 percent of the stock of the parent corporation (Columbia Pictures) of several broadcast licensees in addition to the 20 percent it already held. The bank stated that the additional shares would be acquired in trust with a domestic bank as trustee. The FCC approved the transaction on four conditions. First, the bank could not acquire any additional shares. Second, the bank could not enter into any agreement concerning the manner in which the stock held in the

64. Gavillet, Foehrkolb & Wu, *supra* note 19, at 19-20.

65. See, e.g., *McCaw Cellular Comm., Inc.*, 4 F.C.C. Rcd. 3784, 3788 ¶ 31 (1989) (permitting British Telecom's acquisition of 22% of McCaw's stock); *MMM Holdings Cos., Inc.*, 4 F.C.C. Rcd. 8243, 8247 ¶ 26 (1989) (permitting British Telecom to hold just under 25% of McCaw's stock).

66. 47 U.S.C. § 310(b)(4). See also *Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *Telemundo, Inc. v. F.C.C.*, 802 F.2d 513, 516 (D.C. Cir. 1986).

67. 6 F.C.C.2d 418 (1966).

bank's name would be voted. Third, the bank would have to report to the FCC annually as to all agreements made and all actions taken regarding the stock. Fourth, the bank could not "take any action looking toward assertion of control by it alone or in concert with any other person over [the parent company]." ⁶⁸

This case is the only one in which the FCC has permitted a broadcast licensee to exceed the 25 percent benchmark. ⁶⁹ The FCC's 1995 notice of proposed rulemaking hints that the agency may be more lenient in the future: "It may be appropriate now to revisit our restrictive approach to alien investment in broadcasting. In contrast to the situation that existed in 1927, there are currently a plethora of broadcast and other mass communications facilities available to the general public." ⁷⁰

U.S. Owners, Officers, and Directors. In deciding whether to permit alien ownership in excess of the 25 percent benchmark, the FCC will often consider the level of alien ownership in light of U.S. presence in other areas—such as ownership, officers, and directors. The harsh conditions imposed by the FCC in 1966 in *Banque de Paris de Pays Bas* contrast significantly with the relatively relaxed approach taken by the agency in 1974 in *GRC Cablevision, Inc.*, ⁷¹ where Canadians owned 50 percent of a 60 percent corporate parent of a cable relay service (CARS) licensee. The FCC gave five reasons for permitting the arrangement. First, the parent corporation, though majority alien-owned, was a U.S. corporation. Second, a majority of the parent corporation's directors were U.S. citizens. ⁷² Third, the alien shareholders were from a country with tradition of close

68. *Id.* at 418.

69. Ian M. Rose, Note, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1194 (1995).

70. *Market Entry and Regulation*, 10 F.C.C. Rcd. at 5298 ¶ 102.

71. 47 F.C.C.2d 467, 467 ¶ 2 (1974).

72. *Accord*, Upsouth Corp., 9 F.C.C. Rcd. 2130, 2131 ¶ 12 (1994).

and friendly ties with U.S. Fourth, there was no other adverse information concerning aliens. Fifth, the facility in question would be used for relay of broadcast signals and was thus "largely passive in operation."⁷³

In *Teleport Transmission Holdings*, the FCC approved 65 percent alien ownership in a licensee's parent corporation where the parent had 75 percent U.S. directors and officers.⁷⁴ In *MCI Communications Corp.*, the FCC approved 28 percent alien ownership of the parent where the licensee had 80 percent U.S. directors and 100 percent U.S. officers.⁷⁵ In *A Plus Communications*, the FCC approved transfer of a corporation to an entity with alien ownership known only to be under 50 percent because a majority of its directors were U.S. citizens.⁷⁶ In *IDB Communications Group, Inc.*, the FCC approved 26.2 percent alien ownership of the parent where all officers and 75 percent of the directors were U.S. citizens.⁷⁷

Need for Investor's Capital. The FCC has also considered whether a transfer of more than a 25 percent interest in a licensee to a foreign corporation will protect against deterioration in the licensee's programming and station operations. In *PrimeMedia Broadcasting, Inc.*, the FCC denied an application for a television channel submitted by a company whose parent was owned by foreigners in excess of the section 310(b)(4) benchmark.⁷⁸ The FCC took this action because at least nine other acceptable applicants did not exceed the benchmark, and, the agency reasoned, there was therefore no overriding public interest served by permitting PrimeMedia to remain in the

73. *GRC Cablevision*, 47 F.C.C.2d at 468 ¶ 5.

74. 8 F.C.C. Rcd. 3063, 3065 ¶¶ 10-11 (1993).

75. 9 F.C.C. Rcd. 3960, 3964 ¶ 22 (1994).

76. *A Plus Comm. of Puerto Rico, Inc.*, File No. 22913-CD-TC-(2)-82 (May 13, 1982), discussed in Gavillet, Foehrkolb & Wu, *supra* note 19, at 15.

77. 6 F.C.C. Rcd. 4652, 4653 ¶ 10 (1991).

78. 3 F.C.C. Rcd. 4293, 4295 ¶ 13 (1988).

comparative proceeding.

Common Carriage. In *Data Transmission Co.*, the FCC in 1976 set for hearing the transfer to an alien of the parent corporation a common carrier licensee and listed as one of the issues whether “Section 310 . . . precluded[s] alien control of the parent corporation of a common carrier radio licensee and, if not, what criteria and policy considerations should be developed for considering an application proposing such.”⁷⁹ The case was mooted, however, by the licensee’s bankruptcy. The FCC has since treated a common carrier’s requests for a waiver under section 310(b)(4) more generously than a broadcaster’s.⁸⁰ The agency summarized its reasoning in 1995:

The distinction between common carrier and broadcast licensees in terms of content control has been the basis for our traditionally disparate treatment of these licensees under Section 310(b)(4). While the FCC has granted applications permitting foreign ownership of a parent holding company of a non-broadcast licensee to exceed 25 percent, the FCC has consistently declined to do so in broadcasting because of a broadcast licensee’s ability to control the content of its transmission.⁸¹

The D.C. Circuit has questioned the proposition that common carriers are safer than broadcasters. Referring to the “national security policy underlying section 310(b),” the court in 1993 explained that “the rationale is equally applicable to common carrier radio stations, as they, also, are a part of the nation’s

79. 59 F.C.C.2d 909, 912 ¶ 8 (1976).

80. *Market Entry and Regulation*, 10 F.C.C. Rcd. at 5296–98 ¶¶ 99–103.

81. *Id.* at 5296–97 ¶ 100.

communications network.”⁸²

Capital Contributions. The FCC has ruled that using a simple “count the shares” approach may not accurately measure the extent of alien ownership, especially when the corporation has issued more than one class of stock.⁸³ When it suspects stock ownership may not be proportionate to equity interest, the FCC will consider the amount of foreign capital contribution to a corporation in determining compliance with section 310(b)’s benchmarks.⁸⁴ In applying this standard in *Fox*, the FCC granted the petitioner’s renewal application for its licensee, subject to a showing of compliance with section 310(b)(4).⁸⁵ In *Univision Holdings, Inc.*,⁸⁶ the FCC upheld 12.1 percent capital contributions by alien investors in the corporate holding companies of two licensees.

SOPHISTICATED CAPITAL STRUCTURES

FCC rules and policies, adjudicatory decisions, and a small number of court decisions have supplemented and clarified the statutory restrictions of section 310(b). Still, section 310(b) leaves unanswered a number of specific questions regarding the use of sophisticated equity instruments and partnership structures. Following the broad definition of “corporation”⁸⁷ in the Communications Act, the FCC has reasoned that Congress intended section 310(b) to cover all forms of business association,⁸⁸ and that an overly restrictive interpretation of the term

82. *Moving Phones*, 998 F.2d at 1055–56.

83. *Fox*, 77 Rad. Reg. 2d (P & F) at 1051 ¶ 36.

84. *Id.*

85. *Id.* at ¶ 11.

86. 7 F.C.C. Rcd. 6672, 6673 ¶ 42 (1992), *recon. denied*, 8 F.C.C. Rcd. 3931 (1993).

87. See 47 U.S.C. § 153(j) (“‘Corporation’ includes any corporation, joint-stock company, or association.”).

88. *Attribution of Ownership Interests*, 97 F.C.C.2d at 1009 ¶ 22.

would permit circumvention of the foreign ownership limits.⁸⁹ Likewise, the FCC has interpreted the term "capital stock" to encompass "the alternative means by which equity or voting interests are held in these businesses."⁹⁰ The FCC's definitions of "corporation" and "capital stock" are now so expansive as to encompass policyholders of insurance companies,⁹¹ as well as members of a church⁹² and of a labor union.⁹³

*Non-Voting Stock
and Preferred Stock*

Section 310(b) does not distinguish between voting and non-voting stock, or between common and preferred stock. To the contrary, that statute encompasses stock "owned . . . or voted." In 1986 a group of applicants requested that preferred stock be excluded from the definition of "capital stock" in determining compliance with sections 310(b)(3) and 310(b)(4) "where the applicant certifies that the preferred stock contains none of the indicia normally associated with equity ownership."⁹⁴ The FCC noted that the term "capital stock" generally encompasses various classes of stock (including preferred stock), and indicated that the legislative history did not support any different interpretation of the term.⁹⁵

This interpretation of capital stock differs from the FCC's distinction between voting equity and non-voting equity

89. *Wilner & Scheiner*, 103 F.C.C.2d at 516 ¶ 7.

90. *PrimeMedia*, 3 F.C.C. Rcd. at 4295 ¶ 9 (emphasis omitted).

91. *Farragut Television Corp.*, 4 Rad. Reg. 2d (P & F) 350, 352-53 ¶¶ 5-6 (1965).

92. *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P & F) 1057, 1094 ¶ 16 (1952).

93. *Chicagoland Television Co.*, 4 Rad. Reg. 2d (P & F) 747, 752 ¶ 8 (1965), *application for review denied*, F.C.C. 65-367 (May 5, 1965).

94. *Reconsideration Order*, 1 F.C.C. Rcd. at 13-14 ¶ 15 (preferred stock); *Wilner & Scheiner*, 103 F.C.C.2d at 519 n.37 (non-voting stock).

95. *Wilner & Scheiner*, 103 F.C.C.2d at 511 ¶ 9.

under the ownership attribution rules in cases not involving foreign ownership. To those cases the FCC applies the following rule: "Holders of non-voting stock shall not be attributed an interest in the issuing entity."⁹⁶ The FCC has explained that the attribution criteria are merely "instructive" in making section 310(b) determinations.⁹⁷ It would therefore seem to serve no purpose, for example, for an American licensee to recapitalize itself so that a foreign entity could acquire only 20 percent of voting control while simultaneously acquiring a larger percentage of the U.S. firm's net cash flows.

Convertible Debentures

As a general matter, the FCC does not class convertible instrument such as warrants, convertible debentures, and options under section 310(b)'s definition of "capital stock." Such interests are not considered for attribution of ownership purposes.⁹⁸ The FCC has concluded that the holder of a convertible interest has no control of the licensee if the right to convert the interest is beyond the holder's power.⁹⁹ Thus, the FCC deems convertible interest holders to have little control over the licensee, because the holder's threat to convert would be an empty one. An alien's convertible interest concerns the FCC only if he may actually control the licensee.¹⁰⁰

The FCC addressed the applicability of section 310(b) to convertible debentures in three decisions involving the ultimate-

96. 47 C.F.R. § 73.3555, note 2(f); see also *Attribution Order*, 97 F.C.C.2d at 1020-21 ¶ 45-47.

97. *Wilner & Scheiner*, 103 F.C.C.2d at 520-24 ¶ 16-22.

98. See *Attribution Order*, 97 F.C.C.2d at 1021-22 ¶ 48.

99. *Id.* at 1021 ¶¶ 46-48; see also William S. Paley, 61 Rad. Reg. 2d (P & F) 413, 415 (1986), *recon. denied*, 62 Rad. Reg. 2d (P & F) 852 (1987); Gavillet, Foehrkolb & Wu, *supra* note 19, at 27.

100. Channel 31, Inc., 45 Rad. Reg. 2d (P & F) 420, 421-23 (1979); *Datran I*, 44 F.C.C.2d at 935; *Datran II*, 52 F.C.C.2d at 439; *Datran III*, 59 F.C.C.2d 909; Gavillet, Foehrkolb & Wu, *supra* note 19, at 27.

ly unsuccessful efforts of a Swiss national to revive the Data Transmission Company (Datran), a radio common carrier licensee, with increasingly large infusions of various forms of equity and debt.¹⁰¹ The cases establish that it does not violate section 310(b) to issue an alien debentures that are nominally convertible to the voting stock of a radio licensee (or its parent) in excess of the statutory limits, provided that the debentures contain a restriction forbidding their conversion if conversion would create alien-owned shares in excess of the statutory maximums.¹⁰²

In *Datran II*, the FCC considered the Swiss national's ownership of convertible debentures which, if exercised, would increase his ownership to over 20 percent.¹⁰³ But the debentures contained restrictions on conversions that would result in ownership in excess of the 20 percent benchmark. The FCC approved the proposed investment.¹⁰⁴

Datran III, however, stands for the proposition that the use of debt instruments such as convertible debentures does not per se immunize a transaction from a determination that an alien has obtained de facto control over the parent of a licensee in violation of section 310(b)(4). In that case, the FCC was troubled by the total configuration of alien debt and equity interests and, in particular, by certain "equity" features of the debt. By the time of this decision, the total alien investment (both debt and equity) in Datran had risen to thirty times the equity investment of the nominally controlling party and the alien was the only conceivable source of future investment. Most importantly, the convertible debentures and other debt instruments carried severe restrictions on the management and

101. *Datran I*, 44 F.C.C.2d 935; *Datran II*, 52 F.C.C.2d 439; *Datran III*, 59 F.C.C.2d at 909 ¶¶ 4-5.

102. Thus it is also clear that convertible debentures do not qualify for purposes of section 310(b) as "capital stock owned of record or voted."

103. *Datran II*, 52 F.C.C.2d at 439.

104. *Id.*

operation of the licensee. Thus, the licensee and parent required the alien's approval to sell the licensee's common stock or assets, merge it with another company, or permit it to guarantee loans or purchase the stock of other companies. The FCC found that this configuration of alien-held equity and debt raised a serious question as to whether the alien had in fact obtained de facto control over the parent corporation.¹⁰⁵ The case indicates that the FCC will take a harder look at transactions where the total alien investment is large relative to that of Americans, where the alien-held debt instruments give some measure of control over the parent or licensee, or where factors suggest that debt instruments are in fact equity investments.¹⁰⁶

Debt and Leases

The FCC does not construe section 310(b) to cover debt supplied by alien creditors. In its 1985 declaratory ruling on alien ownership, the FCC stated: "Unlike limited partners, creditors do not possess either an ownership or voting interest over the licensee and consequently the direct restrictions embodied in section 310(b) are not applicable to debt interests."¹⁰⁷ The FCC's ownership attribution rules similarly conclude that both leases and lease-backs are not cognizable ownership interests: "There is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the FCC to oversee."¹⁰⁸

The FCC's rather exiguous reasoning on debt and lease-backs creates an attractive means for structuring acquisitions by

105. *Id.* at 910-12. The issue was never finally decided because Datran went bankrupt, mooting the case.

106. Gavillet, Foehrkolb & Wu, *supra* note 19, at 28-31.

107. *Wilner & Scheiner*, 103 F.C.C.2d at 519 ¶ 14; *Omninet Corp.*, 2 F.C.C. Rcd. 1734 n.15 (1987).

108. *Attribution Order*, 97 F.C.C.2d at 1022 ¶ 49.

aliens. The typical corporate loan agreement will have not only elaborate representations and warranties, but also remedies for the creditor in the event that the debtor fails to meet certain objectively specified financial criteria. These remedies sometimes include the right to name one or more members to the debtor's board. Similarly, commercial leases (retail leases, for example) may have a profit pass-through provision pursuant to which rental payments include a component that varies with the lessee's sales or profits; such a provision causes the lease to resemble a kind of equity.

Debt also may be relevant to the availability of a waiver under section 310(b)(4). If the licensee is already heavily leveraged, then an alien investor may have a stronger argument that its infusion of equity capital will serve the public interest, even if that investment exceeds the statutory limits of section 310(b). Thus, the FCC has stated that it "has the discretion to consider . . . debt transactions[] in evaluating whether to grant an exemption from a strict application of the statutory benchmarks contained in section 310(b)(4) in a specific factual situation where such an exemption would further the public interest."¹⁰⁹ The FCC takes an especially close look at debt financing when the debt is a substantial part of the licensee's capitalization. In *Pan Pacific Television, Inc.*, for example, the FCC found unlawful foreign control to exist because a Taiwanese citizen interested in providing Chinese-language programming to an applicant for a television license near San Francisco had supplied or located substantial sums for the station's construction and operation.¹¹⁰

Partnerships

Section 310(b) does not mention partnerships. The FCC

109. *Wilner & Scheiner*, 103 F.C.C.2d at 519 n.38.

110. 3 F.C.C. Rcd. 6629 (1988).

nonetheless stated in 1984 that each limitation contained in section 310(b) “applies equally to all financial interests in all business forms of licensees.”¹¹¹ No general partner may be an alien, the representative of an alien, a foreign government or the representative of a foreign government, or any corporation organized under the laws of a foreign country.¹¹²

The FCC treats limited partnerships the same as corporations for purposes of the foreign ownership restrictions.¹¹³ Excluding limited partnership interests would allow easy circumvention of the restrictions.¹¹⁴ Also, although limited partners may lack control of the partnership business, the FCC held that alien ownership restrictions were designed to protect the U.S. from foreign *influence* as well as foreign control in the field of broadcasting.¹¹⁵ A limited partner may own up to 20 percent of the partnership’s total equity.

Partners as Officers or Directors. The FCC has held that, for purposes of section 310(b)(3) and (4), partners have sufficient indicia of control to be treated as officers or directors of a corporation.¹¹⁶ Interpreting section 310(b)(3), the FCC in *Jireh’s Broadcasting* denied a radio license to a company with one Canadian partner.¹¹⁷ The FCC applies this analysis to limited partnerships as well as general partnerships,¹¹⁸ reasoning that limited partners have the same authority to bind a company

111. *Attribution Order*, 97 F.C.C.2d at 1009 ¶ 22.

112. *Algreg Cellular Engineering*, 7 F.C.C. Rcd. 8686 (1992); *Great W. Cellular Partners*, 8 F.C.C. Rcd. 3222, 3222 ¶ 2 (1993).

113. *Wilner & Scheiner*, 103 F.C.C.2d at 516 ¶ 9.

114. *Id.* at 515 ¶ 7.

115. *Id.* at 517 ¶ 11.

116. *Delta Cellular Partners*, 5 F.C.C. Rcd. 5525, 5525 ¶ 4 (1990); *Addison Broadcasting Co.*, 2 F.C.C. Rcd. 6357, 6357 ¶ 3 (1987).

117. 5 F.C.C. Rcd. at 3308 ¶¶ 3–4.

118. *See, e.g., Cellwave Tel. Servs. L.P. v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994).

as do general partners.¹¹⁹ After all, a limited partner is “limited” only in the sense that he is protected from total liability in the event the company becomes insolvent. If the limited partner is sufficiently insulated from partnership affairs, however, the FCC will apply the multiplier to his interest in the parent corporation of the licensee.¹²⁰ In at least one instance, the FCC denied a license where a parent company’s limited partners lacked such insulation.¹²¹

Partners as Stockholders. The FCC also considers limited partners to be “stockholders” for purposes of section 310(b).¹²² Their ownership interests are determined by equity contribution. In calculating these limited partner ownership interests, the FCC employs the same multiplier that it uses for attribution purposes. The FCC explains its process as follows:

[A]ssume that (1) Company A, a domestically organized limited partnership, holds 22 percent ownership interest in the licensee; (2) [AI], a natural person who is not a citizen of the United States, is a limited partner with a 25 percent ownership interest in Company A; and (3) all other direct or indirect interests in the licensee are held by United States citizens. If [AI]’s interest is adequately insulated, under the “multiplier” approach, [AI] would be attributed with 5.5 percent ownership interest in the licensee. If [AI] is not insulated from active participation in the business, the multiplier would not be used,

119. *Reconsideration Order*, 1 F.C.C. Rcd. at 14 ¶ 19.

120. *Wilner & Scheiner*, 103 F.C.C.2d at 522 ¶ 20. For a full analysis and examples, see Gavillet, Foehrkolb & Wu, *supra* note 19, at 32–34.

121. See Catherine L. Waddill, 8 F.C.C. Rcd. 2169, 2169 ¶¶ 4–5 (1993).

122. *Wilner & Scheiner*, 103 F.C.C.2d at 520 ¶ 16; *Continental Cellular*, 5 F.C.C. Rcd. 691, 692 n.8 (1990).

and [AI] would be attributed with 22 percent ownership interest in the licensee, thereby violating the ownership benchmark established in section 310(b)(3).¹²³

“Where applicable,” the FCC notes, “the ‘multiplier’ is utilized in any link on the ownership chain to determine the amount of alien ownership or voting interests in the licensee.”¹²⁴ The FCC takes the same general approach to partnership interests under section 310(b)(4).¹²⁵

Irrevocable Trusts

The FCC has also ruled that section 310 covers beneficiaries of irrevocable trusts.¹²⁶ In *PrimeMedia*, the FCC considered an irrevocable trust of which an alien was the beneficiary.¹²⁷ The trustee was to exercise legal title and control over the stock in the licensee corporation for the alien’s benefit, and the alien was to retain the equitable interest in the stock itself. The FCC noted that, although *PrimeMedia* presented a case of first impression as to section 310(b)(3), the agency had previously considered the insulating nature of trusts in other areas of its rules.¹²⁸ The agency then stated that Congress did not intend to exclude equitable ownership interests that do not confer actual control. Thus, even though trusts divorce control and the indicia of ownership from the residual benefit of receiving profits, irrevocable trusts are not exempt from section 310(b)(3).¹²⁹

123. *Wilner & Scheiner*, 103 F.C.C.2d at 523 n.51.

124. *Id.*

125. Gavillet, Foehrkolb & Wu, *supra* note 19, at 33.

126. *PrimeMedia*, 3 F.C.C. Rcd. at 4295 ¶ 11; Teleport Transmission Holdings, 8 F.C.C. Rcd. 3063, 3064 ¶ 8 (1993).

127. 3 F.C.C. Rcd. at 4292 ¶ 7.

128. *Id.* (citing Rust Craft Broadcasting Co., 68 F.C.C.2d 1013, 1017–19 ¶¶ 9–11 (1978); *Attribution Order*, 97 F.C.C.2d at 1023–24 ¶¶ 53–56).

129. *Id.* at 4295 ¶ 11.

ALIEN CONTROL

The Communications Act does not define "control" for purposes of section 310(b). The FCC, has therefore written its own broad definition. In *Powell Crosley, Jr.*, the FCC stated that "[a] realistic definition of the word 'control' includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue."¹³⁰ The FCC has conveniently asserted that "corporate control varies from case to case and cannot be precisely defined," for it involves facts that are case-specific.¹³¹ "Control" is thus a phantom that can take many forms: actual (de facto) or legal (de jure), direct or indirect, negative or affirmative.¹³² The paucity of standards and the breadth of the FCC's assertion of authority to find "control" has produced uncertainty and litigation.

The FCC will examine any affiliation to determine whether it gives an alien de facto or de jure control of a licensee.¹³³ De jure control is typically determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation.¹³⁴ De facto control has not been so precisely defined.¹³⁵ A minority shareholder, for example, "controls" a

130. 11 F.C.C. 3, 20 (1945). *See also* *Metromedia, Inc.*, 98 F.C.C.2d 300, 304 ¶ 8 (interpreting section 309), *recon. denied*, 56 Rad. Reg. 2d (P & F) 1198 (1984), *appeal dismissed sub nom.* *California Ass'n of the Physically Handicapped v. FCC*, 778 F.2d 823 (D.C. Cir. 1985); *WHDH, Inc.*, 17 F.C.C.2d 856, 863 ¶ 17 (1969).

131. *Storer Comm., Inc.*, 101 F.C.C.2d 434, 441 ¶ 22 (1985); *see also* *Datran III*, 59 F.C.C.2d at 910 ¶ 6; *Datran I*, 4 F.C.C.2d at 935.

132. *Fox*, 77 Rad. Reg. 2d (P & F) at 1070 ¶ 150; *Seven Hills*, 2 F.C.C. Rcd. at 6878 ¶ 38; *WWIZ, Inc.*, 2 Rad. Reg. 2d (P & F) 169, 191 ¶ 3 (1964), *aff'd sub nom.* *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1954), *cert. denied*, 383 U.S. 967 (1956).

133. *Fox*, 77 Rad. Reg. 2d (P & F) at 1070-73 ¶¶ 149-65.

134. *Id.* at 1070 ¶ 151.

135. *Univision*, 7 F.C.C. Rcd. at 6675 ¶ 15.

corporation only if he has the power to "dominate the management of corporate affairs."¹³⁶ The FCC acknowledges that influence and control are different.¹³⁷ The FCC defends its de facto control standard as being necessary because operational reality may diverge from legal technicality.¹³⁸ As a result, "even in instances in which the technical statutory requirements are met, the FCC may still find that aliens exercise an effective control over the operations of a station that is contrary to statutory policy."¹³⁹

Alien Consultants

Concern over de facto alien control has arisen in broadcast cases in which the licensee has hired an alien to consult to advise on management or programming. In *Spanish International Communications Corporation*, the FCC designated seven television licenses for a hearing on the issue of whether the licensees were under the de facto control of Mexican interests.¹⁴⁰ In such cases, the FCC has been satisfied that de facto alien control has been corrected when the licensee has cancelled the consulting contracts.

136. *MCI*, 9 F.C.C. Rcd. at 3961 ¶ 11.

137. *WWOR-TV*, 6 F.C.C. Rcd. 193, 199-200 ¶¶ 13-14 (1990).

138. *Telemundo*, 802 F.2d at 513.

139. *Id.*; *Channel 31, Inc., Debtor-in-Possession*, 45 Rad. Reg. 2d (P & F) at 420, 421 (1979).

140. *SICC*, 2 F.C.C. Rcd. at 3336 ¶¶ 1-2.

Special Covenants

In *McCaw Cellular*, the FCC found that covenants giving a minority shareholder the power to block certain major transactions do not, by themselves, constitute corporate control under the Communications Act.¹⁴¹ In fact, certain restrictions that limit the otherwise normal financial prerogatives of a board of directors need not represent control.¹⁴²

A minority shareholder's right to prevent any change in a company's bylaws or charter does not constitute control.¹⁴³ Neither does requiring a minority shareholder's consent before the corporation may amend its bylaws or articles of incorporation. The FCC deems such requirements to be protective of the minority shareholder's investment, as they prevent the dilution of its stock holdings.¹⁴⁴ The FCC takes the same view of steps taken by creditors to force the sale of a licensee.¹⁴⁵ Simply entering into an affiliation agreement with a network that is also an equity partner does not establish control either.¹⁴⁶

However, the FCC has found that special covenants do give de facto control under numerous circumstances. In *Stereo Broadcasters, Inc.*,¹⁴⁷ the FCC found that control also included the ability to direct the applicant's finances, personnel, and programming. Where an alien minority stockholder has full veto power on all or most issues (including financial plans, business plans, and other daily operations of the licensee), the FCC

141. 4 F.C.C. Rcd. at 3789 ¶¶ 37-38; see also *News Int'l, plc*, 97 F.C.C.2d 349 (1984).

142. *Flathead Valley Broadcasters*, 5 Rad. Reg. 2d (P & F) 74, 76 ¶ 6 (Rev. Bd. 1965).

143. *News Int'l*, at 357-58 ¶¶ 19-22.

144. *McCaw Cellular*, 4 F.C.C. Rcd. at 3789 ¶ 39.

145. *Turner Comm. Corp.*, 68 F.C.C.2d 559, 562-63 ¶¶ 9-11 (1978).

146. *BBC License Subsidiary L.P.*, 1995 F.C.C. LEXIS 3086, at *30 ¶¶ 35-36 (Apr. 27, 1995); *NBC, Inc.*, 6 F.C.C. Rcd. 4882, 4883 ¶ 4 (1991).

147. 87 F.C.C.2d 87, 88-89 ¶¶ 3-33 (1981) (interpreting section 310(d)), *recon. denied*, 50 Rad. Reg. 2d (P & F) 1346 (1982).

would likely find the alien to have de facto control.¹⁴⁸

Corporate Spinoffs

The FCC also has a standard for determining whether a corporate spinoff transfers control.¹⁴⁹ FCC requirements can still be met on a review of all relevant facts, despite "carry-over" employees, common directors, and even ongoing business relationships. Parties that challenge spinoffs as inconsistent with section 310(b) must allege specific facts to establish that a substantial and material question as to whether the required degree of corporate segregation would not be established, or that the parties could not be expected to conduct themselves as they have represented. Speculation is not enough for the FCC to refuse a spinoff.¹⁵⁰

Limited Partnerships

The FCC has indicated that alien limited partners may possess "control" of a licensee, in violation of section 310(b). In *Sacramento RSA Ltd. Partnership*, the FCC reconsidered whether a limited partnership's application for a cellular license violated section 310(b)(3).¹⁵¹ The FCC held that it must examine whether an alien limited partner has control comparable to that of an officer or director of a corporation. In particular, the

148. *Satellite Transmission & Reception Specialist Co. and Transmission Operator Provided Systems, Inc.*, DA 90-927 (July 13, 1990) (*STARS/TOPS*) (FCC found de facto control by alien-controlled company where CEO of parent was also CEO of licensee and contract provisions between the parties provided for exclusive use of licensed earth stations by the parent), *discussed in* Gavillet, Foehrkolb & Wu, *supra* note 19, at 45; *Pan Pacific*, 3 F.C.C. Rcd. at 6636 ¶ 37 (substantial involvement by Taiwanese minority shareholder in financial affairs of licensee held to indicate de facto control).

149. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 197-204 ¶¶ 8-22.

150. *Id.* at 204 ¶¶ 21-22.

151. 9 F.C.C. Rcd. 3182, 3183 ¶ 7 (1994).

FCC will scrutinize the partnership agreement to ascertain the degree of insulation.¹⁵²

STRUCTURING ACQUISITIONS TO COMPLY
WITH THE ALIEN OWNERSHIP RESTRICTIONS

The preceding discussion reveals an important implication of the FCC's application of section 310(b). Regulation blocks the simplest means by which alien investors could affiliate themselves with many radio licensees. This impediment does not mean that alien investment in radio licensees covered by section 310(b) will not occur. The following section illustrates how complicated the strategies that alien investors must use to maximize their investment in radio licensees may become.

Recall that a foreigner may hold up to 20 percent ownership or voting interest directly in a licensee *and* up to a 25 percent interest in a company controlling the licensee.¹⁵³ An investor may increase its stake in a licensee by arranging with the licensee to split off a holding company. But this financial structuring is only the beginning.

*Insulated Limited Partnerships
and Nonvoting Stock*

In determining the extent of an alien's limited partnership in a licensee or holding company, the FCC may not, obviously, count shares of stock, since the alien's interest is not in the form of stock. Rather, the FCC examines the extent of the limited partners' equity contribution.¹⁵⁴ The FCC uses a multiplier to measure ownership interests so held, even where the interest is greater than 50 percent.¹⁵⁵ This is also the rule

152. *Id.*

153. Gavillet, Foehrkolb & Wu, *supra* note 19, at 19-20, 40.

154. *Id.* at 32-33.

155. *Id.*

for nonvoting stock.

Suppose *A* is an alien and purchases 60 percent of the voting stock of a corporation, *C*, that owns 30 percent of a licensee, *L*. Because the FCC would not use the multiplier in this case, *A* would be deemed to have a 30 percent interest in *L*, which would violate section 310(b)(3). If *A*'s interest in *C* were in the form of a limited partnership or in the form of nonvoting stock, use of the multiplier would bring *A*'s interest in *L* down to 18 percent, within section 310(b)(3)'s limits.¹⁵⁶

*Debt, Convertible Debentures,
and Options*

The alien investor could also finance the licensee with debt or convertible debentures.¹⁵⁷ Although the FCC does not treat debt or convertible debentures as "stock," it will consider whether terms in such instruments give an investor de facto control of a licensee or a holding company. The instruments should include a provision that conversion of the debt is precluded where it would result in alien ownership that exceeds the benchmarks in section 310(b).¹⁵⁸

Options, on the other hand, are not normally considered to implicate section 310(b) at all, even in the FCC's de facto control inquiries.¹⁵⁹ The exercise of a call option, of course, would implicate section 310(b)(4). Exercise of a put option—which confers the right, but not the obligation, to sell an asset (including stock) at a predetermined price or formula until a certain date—probably would not, for the alien investor's only alternative would be to decreasing his ownership inter-

156. For an example showing how a limited partnership interest could be used to maximize an investment under section 310(b)(4), see *id.* at 40–41.

157. For a thorough analysis, see *id.* at 41–42.

158. See *id.* at 42.

159. See *id.*